Victor Chidiebere Nzomiwu & Ors v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–330, 331 AND 332 OF 2010
ABDUL MALIK ISHAK, CLEMENT SKINNER AND LINTON ALBERT JJCA
1 OCTOBER 2012

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in plastic bag in apartment occupied by appellants — Whether trial judge had misdirected himself when he failed to appreciate defence case — Whether trial judge failed to consider question of whether appellants had rebutted presumption of trafficking under s 37(da)(iiia) of the Dangerous Drugs Act 1952 on balance of probabilities — Whether convictions unsafe — Possession — Whether proven — Dangerous Drugs Act 1952 ss 37(da) & 39B(1)

Criminal Procedure — Sentencing — Factors to be considered — Public interest — Whether deterrent sentence should be imposed

Acting on information received about a drug trafficking activity at an apartment on the seventh floor of a block of apartments situated in Selangor ('the apartment'), a police party headed by Chief Inspector Tansil Mering ('the CI') had conducted a raid of the apartment. The police party gained entry into the apartment by declaring themselves to be Municipality officers checking for mosquitoes. When the first appellant, a Nigerian male, opened the door to the apartment, the CI introduced himself as a police officer. The first appellant attempted to close the door but the CI and his police party managed to enter the apartment. The first appellant then ran towards the balcony while shouting to the second appellant, a South African male, in an unfamiliar language, before jumping off the balcony. Meanwhile, the second appellant, with a towel wrapped around his waist, was observed climbing down the balcony to escape. The police party managed to find the second appellant hiding in the ceiling of an unoccupied apartment and arrested him. The first appellant, who had sustained a broken hand and a broken back from his fall was found lying motionless on the road. He was guarded by the police party until he was admitted to the hospital and found to be in a stable condition. The third occupant of the apartment, a Thai national ('the third appellant'), was seated on the sofa in the living room of the apartment when the CI and the police party entered the apartment. In the living room the CI found a yellow plastic bag that contained one orange plastic bag of drugs and one other green plastic bag containing 110 capsules. The contents of the two plastic bags were analysed

and confirmed by the chemist to be 1136.6g of heroin and 172.3g of monoacetylmorphines ('the drugs'). When the CI approached the third appellant she started crying and saying she did not know anything about the drugs in the bags. The three appellants were arrested and charged. The charge in this case was that pursuant to a common intention the three appellants were trafficking in the drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Upon the close of the prosecution case the trial judge was satisfied that a prima facie case had been made out against the three appellants and called upon them to enter their defence. The first appellant testified that he fled because he mistook the police officers to be the same robbers who had robbed him when he was staying in his former apartment and denied ownership of the drugs that were found in the apartment, which he occupied with the second appellant and two others. The second appellant testified that he had run and hid himself after he saw the first appellant running towards the balcony and shouting to him to run. He also denied ownership of the drugs that were found in the apartment. The third appellant testified that she had met the second appellant through the Internet and had visited Malaysia on a social visit pass. She also denied any knowledge of the contents of the plastic bags and explained that she had cried because she was afraid. The trial judge found the three appellants guilty of the charge of trafficking after having applied the presumption under s 37(da)(iiia) of the DDA and sentenced them to death pursuant to s 39B(2) of the DDA. This was the appellants' appeal against their convictions and sentences. The appellants' two grounds of appeal were that the trial judge misdirected himself when he ruled that the prosecution had proved a prima facie case against the third appellant and when he failed to appreciate the defence case.

Held, allowing the appeal and quashing the convictions and sentences:

(1) The High Court judge had misdirected himself when he failed to consider at all the question of whether the first, second and third appellants had rebutted the presumption of trafficking under s 37(da)(iiia) of the Act on the balance of probabilities. In the circumstances, it was unsafe to convict all the three appellants for the offence of trafficking in the drugs as per the charge (see para 79).

(2) However, on the available evidence there was clear evidence of possession of the drugs pursuant to a common intention of them all. Consequently the convictions and sentences passed by the High Court were quashed and substituted with a conviction of each of the appellants under s 12(2) of the Act punishable under s 39A(2) of the Act read with s 34 of the Penal Code (see para 79).

(3) After taking into account the fact that the appellants were first time offenders and foreigners and also after considering their respective roles as reflected in the factual matrix outlined in this judgment an order was

made that the sentences should run from the date of arrest. At the same time, the fact that the first and second appellants came to Malaysia as students and ended up committing a serious offence necessitated the imposition of a deterrent sentence for all three appellants. In the circumstances, the three appellants were each sentenced to 20 years imprisonment with effect from the date of arrest. In addition, the first and second appellants were each sentenced to 18 strokes of the rattan but the third appellant was spared this punishment by virtue of s 289(a) of the Criminal Procedure Code (see paras 87–90).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima berhubung kegiatan pengedaran dadah di sebuah apartmen di tingkat tujuh sebuah blok apartmen yang terletak di Selangor ('apartmen tersebut'), pasukan polis yang diketuai oleh Ketua Inspektor Tansil Mering ('KI') telah menjalankan serbuan di apartmen tersebut. Pasukan polis itu dapat masuk ke dalam apartmen tersebut dengan menyatakan mereka adalah pegawai-pegawai Perbandaran yang memeriksa jika ada nyamuk. Apabila perayu pertama, seorang lelaki berbangsa Nigeria, membuka pintu apartmen tersebut, KI memperkenalkan dirinya sebagai pegawai polis. Perayu pertama mencuba menutup pintu tetapi KI dan pasukan polisnya berjaya memasuki apartmen tersebut. Perayu pertama kemudian telah berlari ke arah balkoni sambil menjerit kepada perayu kedua, seorang lelaki berbangsa Afrika Selatan, dalam bahasa yang tidak dikenali, sebelum terjun daripada balkoni tersebut. Sementara itu, perayu kedua, dengan tali melilit pinggangnya, dilihat memanjat turun balkoni itu untuk melarikan diri. Pasukan polis telah berjaya mencari perayu kedua yang bersembunyi di bahagian siling apartmen yang tiada penghuni dan telah menangkapnya. Perayu pertama, yang mengalami patah tangan dan patah tulang belakang akibat jatuh didapati tertiarap tidak bergerak atas jalan. Dia dikawal oleh pasukan polis sehingga dimasukkan ke hospital dan didapati dalam keadaan stabil. Penghuni ketiga apartmen tersebut, warganegara Thai (perayu ketiga), duduk di sofa dalam bilik tetamu apartmen tersebut apabila KI dan pasukan polis memasuki apartmen tersebut. Di bilik tetamu itu KI menemui beg plastik kuning yang mengandungi satu beg plastik oren mengandungi dadah dan satu beg plastik hijau lain yang mengandungi 110 kapsul. Kandungan dua beg plastik itu dianalisis dan disahkan oleh ahli kimia sebagai heroin seberat 1136.6g dan momoacetylmorphines seberat 172.3g ('dadah tersebut'). Apabila KI mendekati perayu ketiga dia mula menangis dan mengatakan dia tidak mengetahui apa-apa tentang dadah tersebut dalam beg-beg itu. Ketiga-tiga perayu telah ditangkap dan dituduh. Pertuduhan dalam kes ini adalah berikutan niat bersama ketiga-tiga perayu mengedar dadah tersebut di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Selepas penutup kes pendakwaan hakim perbicaraan berpuas hati bahawa kes prima facie telah dibuktikan terhadap ketiga-tiga perayu dan memanggil mereka memasukkan pembelaan mereka. Perayu pertama memberi keterangan bahawa dia lari

kerana dia salah anggap yang pegawai polis itu perompak sama yang telah merompaknya semasa dia tinggal di apartmen lamanya dan menafikan milikan dadah tersebut yang dijumpai dalam apartmen itu, yang didiaminya dengan perayu kedua dan dua yang lain. Perayu kedua memberi keterangan bahawa dia telah lari dan menyembunyikan dirinya selepas dia melihat perayu pertama lari ke arah balkoni dan menjerit kepadanya supaya lari. Dia juga menafikan milikan dadah tersebut yang dijumpai dalam apartmen tersebut. Perayu ketiga memberi keterangan bahawa dia telah bertemu dengan perayu kedua melalui internet dan telah melawat Malaysia atas pas lawatan soial. Dia juga menafikan apa-apa pengetahuan berhubung kandungan beg-beg plastik dan menjelaskan bahawa dia telah menangis kerana takut. Hakim perbicaraan mendapati ketiga-tiga perayu bersalah kerana pertuduhan mengedar dadah setelah mengguna pakai andaian di bawah s 37(da)(iiia) ADB dan menjatuhkan hukuman mati ke atas mereka menurut s 39B(2) ADB. Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman mereka. Dua alasan rayuan perayu-perayu adalah bahawa hakim perbicaraan telah salah arah diri beliau semasa memutuskan bahawa pendakwaan telah membuktikan kes prima facie terhadap perayu ketiga dan semasa beliau gagal memahami kes pembelaan.

Diputuskan, membenarkan rayuan dan membatalkan sabitan-sabitan dan hukuman-hukuman:

(1) Hakim Mahkamah Tinggi telah salah arah apabila beliau gagal mengambil kira persoalan sama ada perayu-perayu pertama, kedua dan ketiga telah mematahkan andaian pengedaran di bawah s 37(da)(iiia) Akta tersebut atas imbangan kebarangkalian. Dalam keadaan itu, adalah tidak selamat untuk mensabitkan kesemua tiga perayu kerana kesalahan pengedaran dadah sebagaimana pertuduhan (lihat perenggan 79).

(2) Walau bagaimanapun, berdasarkan keterangan sedia ada terdapat keterangan jelas berhubung milikan dadah tersebut berikutan niat bersama mereka semua. Selanjutnya sabitan dan hukuman oleh Mahkamah Tinggi telah dibatalkan dan digantikan dengan sabitan untuk setiap perayu-perayu di bawah s 12(2) Akta tersebut yang boleh dihukum di bawah s 39A(2) Akta tersebut dibaca bersama s 34 Kanun Keseksaan (lihat perenggan 79).

(3) Setelah mengambil kira fakta bahawa perayu-perayu merupakan pesalah kali pertama dan orang asing dan juga setelah mengambil kira peranan masing-masing sebagaimana digambarkan dalam fakta matrik yang dinyatakan dalam penghakiman ini satu perintah telah dibuat bahawa hukuman-hukuman tersebut patut dilaksanakan dari tarikh tangkapan. Pada masa sama, fakta bahawa perayu-perayu pertama dan kedua telah datang ke Malaysia sebagai penuntut dan akhirnya telah melakukan kesalahan serius yang perlu dikenakan hukuman pencegahan untuk kesemua tiga perayu tersebut. Dalam keadaan berikut, ketiga-tiga perayu

setiap seorang telah dihukum sehingga 20 tahun penjara bermula dari tarikh tangkapan. Tambahan pula, perayu-perayu pertama dan kedua setiap seorang telah dihukum 18 kali sebatan rotan tetapi perayu ketiga dikecualikan hukuman ini menurut s 289(a) Kanun Acara Jenayah (lihat perenggan 87–90).]

Notes

For cases on trafficking, see *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

For cases on factores to be considered, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4740–4747.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Director of Public Prosecutions v Brooks [1974] 2 All ER 840, PC (refd)
AG v British Broadcasting Corporation [1980] 3 All ER 161, HL (refd)
Ibrahim bin Masod & Anor v PP [1993] 3 SLR 873, CA (refd)
R v James Henry Sargeant [1974] 60 Cr App R 74, (refd)
R v Kenneth John Ball [1951] 35 Cr App R 164 (refd)
Khairuddin bin Hassan v PP [2010] 6 MLJ 145, FC (refd)
Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)
Mahbub Shah v King-Emperor [1945] 1 LR 148, CA (refd)
Mohd Haikal bin Mohd Khatib Saddaly & Ors v PP [2009] 4 MLJ 305; [2009] 4 AMR 504; [2011] 5 CLJ 369, CA (refd)
Muhammad Isa bin Aris & Ors [2011] 5 MLJ 342; [2011] 3 CLJ 510; [2011] 3 AMR 281, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Ong Ah Chuan v PP Koh Chai Cheng v Public Prosecutor [1981] 1 MLJ 64, PC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717,FC (refd)
PP v Foo Jua Eng [1966] 1 MLJ 197 (refd)
PP v Ismail bin Loyok [1958] MLJ 223 (refd)
PP v Lai Ah Bee [1974] 2 MLJ 74 (refd)
PP v Loo Chang Hock [1988] 1 MLJ 316 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 AMR 4, CA (refd)
Tan Yew Choy v PP [2010] 5 MLJ 212, FC (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 289(a)
Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da)(iiia), 39A(2), 39B(1)(a), (2), First Schedule
Penal Code ss 32, 34

Appeal from: Criminal Trial No 45–66 of 2009 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellants.
Nurulhuda Nuraini bt Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution/respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] Victor Chidiebere Nzomiwu, a Nigerian ('the first appellant'), Mokoape Lucky Thabo, a South African ('the second appellant'), and Mrs Pansiri Oaphavarin, a Thai national ('the third appellant'), were jointly charged for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act read with s 34 of the Penal Code before the High Court of Shah Alam, Selangor. The charge against them reads as follows:

> Bahawa kamu secara bersama-sama pada 3 Mac 2009 jam lebih kurang 11.00 malam di alamat 706 Jalan Perdana 5/1, Ascadia Tower, Pandan Perdana, 55300 Ampang di dalam daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan dengan niat bersama telah mengedar dadah berbahaya sejumlah berat 1308.9 gram (1136.6 gram heroin dan 172.3 gram monoacetylmorphines) dan oleh demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama yang dibaca bersama seksyen 34 Kanun Keseksaan.

[2] All the three appellants were convicted at the end of the trial and they were sentenced to death. Aggrieved, all the three appellants now appeal to this court.

THE SALIENT FACTS

[3] On 3 March 2009, Chief Inspector Tansil Mering ('SP4') received an information about a drug trafficking activity at an apartment bearing address as per the charge and he quickly assembled a team of police personnel which included Inspector Mohamad Rashidi bin Mat Din ('SP5'), Detective

Corporal Rajandran al/ Rangasamy ('SP7'), Detective Corporal Rizal bin Zainal Abidin, Detective Corporal Rabiah bt Mohd Ali, Detective Lance Corporal Hawa Samsinar bt Ali and constable Khairul bin Mohd Ridhuan and briefed them about a raid to be conducted on that apartment. It was on the seventh floor. SP4 and the police party arrived at the apartment at about 11am on 3 March 2009 and he found the grille to the wooden door was unlocked while the wooden door was locked. SP4 knocked at the wooden door but no one opened it. SP7 then knocked at the wooden door and declared, 'Municipality, mosquito, open the door' ('Bandaraya, mosquito, buka pintu' — cross-examination of SP4 at p 55 of the appeal record at *Jilid* 1). At this juncture, the first appellant opened the wooden door and SP4 introduced himself as a police officer. Upon hearing this, the first appellant attempted to close the wooden door but to no avail. SP4 and his police party succeeded in pushing the wooden door and that door was forced open. On gaining entry into the said apartment, SP4 saw the first appellant run towards the balcony and jump down.

[4] SP4 also heard the first appellant shout to the second appellant in an unfamiliar language while the first appellant was running towards the balcony before jumping down. At that juncture, SP4 saw the second appellant in the living room with a towel wrapped around his waist and SP4 also saw the second appellant run towards the balcony and climb down from the balcony in order to escape.

[5] At the living room, SP4 also saw the third appellant was seated on the sofa (see p 34 of the appeal record at *Jilid* 1). According to SP4, the reaction of all the three appellants aroused his suspicion that there was something legally wrong in the said house ('Apabila saya lihat reaksi kesemua Tertuduh, saya syaki ada sesuatu yang salah dari segi undang-undang berada di dalam rumah tersebut' — p 34 of the appeal record at *Jilid* 1).

[6] SP4 then directed Detective Corporal Rizal bin Zainal and Detective Lance Corporal Hawa Samsinar bt Ali ('two detectives') to go to the ground floor of the said apartment and check the first appellant who had jumped from the balcony. From the seventh floor of the said apartment, SP4 saw the first appellant sprawling on the roadside. The two detectives were also directed by SP4 to check the whereabouts of the second appellant who had earlier climbed down from the balcony of the said apartment.

[7] According to SP4, the two detectives telephoned him on the handphone and relayed the information that the first appellant sustained a broken hand and a broken back and was lying motionless on the road. The two detectives also relayed the information on the handphone that the second appellant was

seen entering the third floor of the said apartment and SP4 directed the two detectives to arrest the second appellant.

[8] SP5, with the assistance of the two detectives, arrested the second appellant. SP5 testified that together with the two detectives, he went to the third floor of the said apartment where the second appellant took refuge. SP5 came to know that the unit which the second appellant was hiding in was unoccupied and so, SP5 decided to cut the grille of that unit and break the wooden door in order to gain access. After gaining access and searching for the second appellant in the unit in question, SP5 found that the second appellant was hiding in the ceiling above the toilet of the master bedroom and SP5 ordered the second appellant to come down and surrender himself. The second appellant complied and SP5 then arrested the second appellant and escorted him to the seventh floor where SP4 was located. According to SP5, when the second appellant was arrested, he was only wearing a towel that wrapped around his waist. And according to SP5, the immobile first appellant who jumped from the balcony of the seventh floor and laid injured on the road was guarded by other police personnel from IPD Ampang Jaya.

[9] Meanwhile, SP4 examined the living room of the said apartment. SP4 found a yellow plastic bag containing one orange plastic inside it. Inside that plastic, SP4 found what he believed to be drugs — cocaine. There was also one other green plastic bag bearing the word 'Jusco' and inside it, SP4 found 110 capsules containing what he believed to be drugs.

[10] At this juncture, SP4 was asked by the prosecution as to the reaction of the third appellant who was seated on the sofa at that time. SP4 replied that the third appellant appeared frightened and when SP4 approached her, she cried and said that she did not know about the drugs that was seized by SP4 ('Dalam keadaan ketakutan dan masa saya menghampiri beliau dia menangis dan dia menyatakan bahawa dia tidak tahu mengenai dadah yang dirampas oleh saya') — see p 36 of the appeal record at *Jilid* 1).

[11] It was in evidence that SP4 examined the contents of the two plastic bags in the presence of the second and third appellants. According to SP4, both the plastic bags were not closed or their ends tied together and so, their contents were visible.

[12] According to SP4, there were three rooms in the said apartment and he also confiscated the passports of all the three appellants and handed those passports to Inspector Nor Aishah bt Ishak ('SP8') — the investigating officer of the case. SP8 went to the Ampang Hospital and met the first appellant who was warded there. According to SP8, the first appellant broke both of his hands and shoulder, and sustained injury to his waist, but he was in a stable condition.

SP8 testified that she received the two plastic bags containing the suspected drugs from SP4 and she marked them accordingly and kept them in the steel cabinet under lock and key and that steel cabinet was located in her office which was also locked by her. SP8 also visited the said apartment accompanied by SP4 and the police photographer. Photographs of the said apartment were taken. SP8 also drew the rough sketch plan of the said apartment together with the key thereto.

[13] At the said apartment, SP8 seized an Astro (satellite television) receipt (exh 'P33') in the name of the first appellant. SP8 also seized a TNB (electricity) receipt (exh 'P34') found in the said apartment in the name of Cheong Seng Tin ('SP3').

[14] SP3 testified that he owned the said apartment and he rented out the said apartment to the second appellant at RM680 per month. According to SP3, two keys to the said apartment were handed to the second appellant, namely:

(a) one key to the front wooden door; and

(b) one key to the front grille.

[15] It was, according to SP3, the second appellant who paid the monthly rental to SP3 for approximately one year. The wife of SP3 by the name of Ng Geok Choo ('SP6') gave evidence for the prosecution. SP6 testified that the said apartment is registered in her name as well as her husband's. Between March 2008 to March 2009, according to SP6, the said apartment was rented out to Victor — the first appellant. The house rent receipts bearing serial numbers 38499 dated 27 July 2008 and 13811 dated 24 May 2008 were in the name of 'Victor' — the first appellant. SP6 testified that the bulk of the monthly rentals were collected by her husband — SP3.

[16] In due course, the government chemist analysed the incriminating exhibits found in the two plastic bags and confirmed them to be dangerous drugs, to wit, 1308.9g comprising of 1136.6g heroin and 172.3g monoacetylmorphines, as listed in the First Schedule to the Dangerous Drugs Act 1952 ('DDA').

PRIMA FACIE CASE

[17] The learned High Court judge evaluated the evidence of the prosecution's witnesses on a maximum basis following the provision of s 180 of the Criminal Procedure Code ('CPC') and the guidelines set by *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC) and *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741 (FC), before calling the defence of

all the three appellants on the original charge of trafficking in the dangerous drugs as per the charge. In so doing, His Lordship invoked the statutory presumption of trafficking under s 37(da)(iiia) of the DDA against all the three appellants.

THE DEFENCE OF THE FIRST AND SECOND APPELLANTS

[18] It was conceded that there was evidence to show that both the first and second appellants were tenants of the said apartment. It was conceded that both the first and second appellants escaped when the said apartment was raided by SP4 and his police party. But both the first and second appellants explained why they fled.

[19] The first appellant testified that he had arrived in Malaysia on 8 August 2007 on a student visa and had been staying in the said apartment for about a year before he was arrested on 3 March 2009. And that prior to staying at the said apartment, he was staying in a condominium in Pandan Perdana for six months but had moved houses after he was robbed by four men who claimed to be policemen sometime in October 2007. The first appellant testified that he did not lodge a police report pertaining to the robbery at Pandan Perdana because the four robbers had threatened against the first appellant from doing so. According to the first appellant, he had been staying in the said apartment with three other students of Nigerian nationality and that they had returned to Nigeria. That there were three rooms in the said apartment and the first appellant occupied the master bedroom with another person by the name of Sunday ('DW4'). And that the middle room was occupied by one 'Ifeanyi' as at 3 March 2009 while the second appellant occupied the third bedroom with the third appellant. That the first appellant had left the said apartment on 3 March 2009 at about 10am to go to SLC College in Petaling Jaya leaving the second appellant, the third appellant, Ifeanyi and Sunday (DW4) in the said apartment. When the first appellant returned to the said apartment at about 10.30pm, the first appellant saw that the second appellant was watching television in the hall while the third appellant was cooking in the kitchen. The first appellant then went inside his room to change his clothes.

[20] That about half an hour later, the first appellant heard a knock on the front wooden door and he also heard someone saying, 'Open the door, we are DBKL'. The first appellant then opened the front wooden door and he saw three men in civilian clothes. The first appellant testified that he saw one of the men was holding a gun while the second man was holding a pair of pliers and the third man was holding an iron rod. The first appellant said that he became frightened because he thought that the three men were the same robbers who had robbed him when he was staying in the condominium at Pandan Perdana. So, the first appellant tried to close the front wooden door but to no avail. The

first appellant then ran towards the balcony and upon seeing the second appellant, the first appellant shouted in the Igbo (Nigerian) dialect to the second appellant asking the latter to run. The first appellant ran towards the balcony and while he was attempting to climb down the iron grille, he fell to the ground. The first appellant said that he could not remember anything else until he woke up in the hospital. When interrogated by the police, the first appellant denied ownership of the drugs that were found in the said apartment.

[21] The second appellant testified that he arrived in Malaysia on 15 January 2009 and five days later he was introduced to the first appellant by someone by the name of 'Bobby'. That on 3 March 2009, the second appellant was staying with the first appellant at the said apartment. That the second appellant occupied the third and the smallest bedroom. And that the second appellant became acquainted with the third appellant through the internet for approximately one month and had met her for the first time on 1 March 2009 when she first arrived in Malaysia. That the second appellant had gone to fetch her at the bus station at Kotaraya and brought her to the said apartment.

[22] The second appellant testified further along the following lines. That on 3 March 2009, together with the third appellant, he left the said apartment at about 11am to go shopping. And when he left the said apartment, Sunday (DW4) was still asleep and Ifeanyi was having his meal in the dining area. He went shopping with the third appellant at Mid Valley and China Town areas and returned to the said apartment at about 10pm. After resting for a while, he saw the first appellant return to the said apartment at about 10.30pm. The second appellant then went to the bathroom to take a shower while the third appellant went to the kitchen. When the second appellant was exiting the bathroom with a towel wrapped around his waist, he saw the first appellant running towards the balcony and shouting to him in the Igbo (Nigerian) dialect to run. The second appellant then saw several men chasing after the first appellant. The second appellant saw one of the men was armed with a firearm — a gun, to be precise, and another man was holding an iron rod. Without further ado, the second appellant followed the first appellant and climbed down the balcony. The second appellant saw the first appellant fell to the ground. Upon reaching the third floor, the second appellant entered an apartment through an open door. The second appellant found that the apartment on the third floor was unoccupied and empty. The police then arrived and, according to the second appellant, one police officer pointed a gun at him while another had handcuffed his hands to the back and started to assault him. The second appellant disagreed that he was arrested while he was hiding in the ceiling of the third floor apartment.

[23] With police escort, the second appellant was taken to the said apartment on the seventh floor where SP4 was located. Upon entering the said

apartment, the second appellant saw the third appellant was handcuffed and seated in the hall. The second appellant was beaten again by the police in the presence of the third appellant. On seeing this, the third appellant started to cry. The second appellant denied ownership of the drugs recovered in the said apartment. The police then entered the second appellant's bedroom and took some clothes and asked the second appellant to put them on.

[24] It was established by way of cross-examination that the second appellant entered Malaysia on a social visit pass which was valid for three months. The second appellant testified that his purpose of coming to Malaysia was to purchase mobile phones to be sold in Africa and this business idea came from 'Bobby'. It seemed that 'Bobby' had been buying mobile phones and selling them in Africa for a lucrative sum. And 'Bobby' had gone back to Africa about a week prior to 3 March 2009. The second appellant testified that he had purchased about 50 mobile phones and had given them to 'Bobby' just before the latter's return to Africa.

THE DEFENCE OF THE THIRD APPELLANT

[25] In her testimony, she confirmed the second appellant's version as to how and when they had met. She stayed with the second appellant in the said apartment. She stated that her visit to Malaysia was for social purposes and that she wanted to purchase imitation bags to be sold in Thailand. She said that she works as a salesgirl in Thailand.

[26] She testified that on 3 March 2009 at about 11am she left the said apartment and accompanied the second appellant to go shopping. She returned to the said apartment with the second appellant at about 10pm. By that time, the first appellant was already in the said apartment. She said that she was in the kitchen at that time. And while she was cleaning some vegetables, she heard the conversation between the first and second appellants. At this juncture, she heard some voices coming from the direction of the front wooden door. She walked out of the kitchen and she saw the first appellant walking towards the front wooden door. She then re-entered the kitchen to continue her cooking.

[27] She then heard a loud commotion and she saw two men enter the kitchen. The two men identified themselves as policemen and directed her to sit in the hall. Her hands were cuffed and she was told to keep quiet. She started crying because she was afraid. She saw the police start to search the said apartment. She said that one of the men had taken a plastic bag from the middle room and showed it to her and asked her whether she knew the contents and its owner. At this point of time, she saw the second appellant being brought back to the said apartment in handcuffs. She said that the second

appellant was assaulted by the police. Again, she started to cry and she was told to keep quiet by the police.

SUNDAY MICHAEL (DW4)

[28] DW4 was the defence witness. He testified that he arrived in Malaysia on 17 November 2008 on a student visa in order to study the English Language at SLC College. He stated that he shared the master bedroom with the first appellant. And that the middle room was occupied by Ifeanyi while the third bedroom was occupied by the second appellant. He testified that the third appellant only came a day earlier and that would be on 2 March 2009 and she was staying with the second appellant in the third bedroom. On 3 March 2009 at about 12 noon, he woke up from sleep and found that only Ifeanyi was in the said apartment. And when he left the said apartment at about 2pm, Ifeanyi was still in the said apartment. He only returned to the said apartment at 3am.

ANALYSIS

[29] Only two grounds were canvassed before us. Firstly, that the learned High Court judge misdirected himself when he ruled that the prosecution has proved a prima facie case against the third appellant. Secondly, that the learned High Court judge misdirected himself when he failed to appreciate the defence case.

THE FIRST GROUND

[30] It was submitted that there was no prima facie case against the third appellant for the following reasons:

(a) that the third appellant was not a tenant of the said apartment;

(b) that the learned High Court judge noted that the third appellant had entered Malaysia on 1 March 2009 and had stayed in the said apartment for two days before she was arrested (see p 216 of the appeal record at *Jilid* 2);

(c) that the learned High Court judge was wrong when he held at p 217 of the appeal record at *Jilid* 2 that her link to the first and second appellants hinged on her act of crying and her protest of no knowledge of the drugs even before the police had shown her the two plastic bags containing the drugs to her;

(d) that the third appellant's conduct of crying cannot be equated with guilt because the manner in which the said apartment was raided brought fear and that made the third appellant to cry: see the speech of Augustine Paul

FCJ in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, (FC), at pp 44-45 (MLJ); 746–747(CLJ) where His Lordship said:

> It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required.

(e) that the learned High Court judge erred when His Lordship made the finding that the third appellant protested even before the drugs were shown to her, whereas chronologically speaking, the drugs were discovered first, followed by the evidence of the reaction of the third appellant;

(f) even if the evidence of SP4 can be accepted as true (which the defence said otherwise), all the evidence against the third appellant showed proximity and proximity alone cannot amount to knowledge let alone possession;

(g) thus, mere presence of the third appellant cannot amount to possession (*Public Prosecutor v Lai Ah Bee* [1974] 2 MLJ 74); and

(h) mere presence is not sufficient to fasten common intention because there must be a pre-arranged plan and whether there was such a plan depends on the conduct of the third appellant (*Mahbub Shah v King-Emperor* [1945] 1 LR 148, (CA)).

[31] On all of these grounds, it was submitted that the third appellant should have been acquitted at the close of the prosecution's case. It was further submitted that the learned High Court judge had doubts about the third appellant when His Lordship adjourned the prima facie ruling date.

[32] Abdul Malik bin Ishak, JCA in *Mohd Haikal bin Mohd Khatib Saddaly & Ors v Public Prosecutor* [2009] 4 MLJ 305; [2009] 4 AMR 504 at pp 538–539; [2011] 5 CLJ 369, at pp 340–341 at pp 412–413 referred to the provision of s 180 of the Criminal Procedure Code ('CPC') and had this to say about the phrase 'prima facie case':

> [135]Sub-section (4) of s 180 of the Criminal Procedure Code sets out the meaning to the all important phrase of 'a prima facie case'. It talks about 'credible evidence' that the prosecution has adduced to prove each ingredient of the offence which if unrebutted or unexplained would warrant a conviction but it does not explain what is 'credible evidence'.
>
> [136]Vincent Ng J (now JCA) in *Public Prosecutor v Ong Cheng Heong* [1998]

6 MLJ 678 said that 'credible evidence' is evidence which has been filtered and which has gone through a process of evaluation.

[137]Augustine Paul JCA (now FCJ) in *Balachandran v Public Prosecutor* [2005] 1 AMR 321; [2005] 2 MLJ 301, a Federal Court case, had this to say of the phrase 'a prima facie case' (see p 338 (AMR); p 315 (MLJ):

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.

[138]And at p 339 (AMR); p 316 (MLJ) of the same case, Augustine Paul JCA (now FCJ) spoke of the test to determine what is prima facie:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[139]Gopal Sri Ram JCA (now FCJ) speaking for this court in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 AMR 89; [2003] 2 MLJ 65, had this to say of what a judge should do when sitting alone in the context of s 180 of the Criminal Procedure Code. This was what His Lordship said at p 104 (AMR); p 81 (MLJ):

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[140]To paraphrase these two authorities, the law may be stated in this way. At the close of the prosecution's case, the trial judge must scrutinise the evidence adduced by the prosecution on a maximum evaluation basis — the required standard, and then to ask himself one very pertinent question: Can I convict him if he elects to remain silent after the defence has been called based entirely on the evidence led by the prosecution? If the answer is in the positive, a prima facie case has been made out and the accused has to be convicted. If the answer is in the negative, then no prima facie case has been made out and the accused is entitled to be acquitted.

[33] The standard of proof on the prosecution at the close of the prosecution's case is to make out a prima facie case. Thus, the prosecution has

to adduce credible evidence to prove each ingredient of the offence which, if unrebutted or unexplained, would warrant a conviction. Likewise, if, at the close of the prosecution's case, there is a material gap in the evidence or a break in the chain of evidence or two or more inferences may be drawn from the prosecution evidence, then the prosecution has not made out a prima facie case. If that is the position, then there is no case to answer and the accused will be acquitted and discharged. It must always be borne in mind that it is for the prosecution to establish the accused's guilt. It is trite that the defence should not be called merely to clear any doubt in the prosecution's case or to supplement any deficiency in the prosecution's case.

[34] So, the force of the evidence adduced by the prosecution must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge and the defence has to be called. And when the accused refuses to enter his defence or remains silent, he is guilty as charged. The trial judge has to convict the accused on the totality of the evidence contained in the prosecution's case.

[35] There must be sufficient credible evidence for the prosecution to establish the charge and satisfy the trial judge to believe in the existence of the facts stated in the charge. The trial judge has to rule that the accused provide an explanation or introduce evidence in rebuttal. And if the accused fails to do so or chooses on his own accord to remain silent, it is fatal. The trial judge has no alternative but to convict the accused.

[36] Here, the prosecution invoked s 34 of the Penal Code to fasten criminal liability onto the third appellant. Section 34 of the Penal Code was also invoked against the first and second appellants to pin criminal liability on them. That s 34 of the Penal Code reads as follows:

> 34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[37] Richard Malanjum CJ (Sabah and Sarawak) in *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603, (FC), at pp 662–663(MLJ); 626–627(CLJ), laid down the law on s 34 of the Penal Code in these trenchant terms:

> (60) It is settled law that s 34 is a rule of evidence and does not create a substantive offence. Simply put it is a statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly it is just the same as if each of them had done it individually. It is an embodiment of the concept of joint liability in doing the criminal act based on common intention. Hence, an accused person is made

responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act.

(61) The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of each case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.

(62) For a charge premised on common intention to succeed it is essential for the prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

[38] Thus, in cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention.

[39] And to succeed on common intention, it is not necessary for the prosecution to prove presence at the scene. The Singapore Court of Appeal in the case of *Ibrahim bin Masod & Anor v Public Prosecutor* [1993] 3 SLR 873 aptly said that (see the headnote):

(2) The mere fact that the first appellant was apparently not present on the scene when Phang was strangled to death did not absolve him from the liability of the consequences of the strangling, since the strangling was in furtherance of a common intention of them both.

[40] Here, the third appellant was present in the said apartment when SP4 and his police party raided the said apartment.

[41] Gopal Sri Ram JCA (later FCJ) in *Sabarudin bin Non & 3 Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 AMR 4, (CA), at pp 51–52(MLJ); 22–23(CLJ), aptly said:

(31) The main point made and emphasised by both learned counsel for the fourth and fifth accused is that there must be presence and participation for s 34 to bite. They argue that since neither of their clients was present at either the scene of the abduction nor at the place where the deceased was done unto death, nor at the scene where her body was cast into the ravine s 34 has no application to the fourth and fifth accused. With respect, as a matter of law, we are unable to agree with this submission. In our judgment, presence in every case is not necessary for s 34 to apply. In our judgment, s 34 should be interpreted having regard to modern technological advances. The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for s 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an interpretation of the section made at a time when science was at a very early stage of development. We find support for our view from the judgment of Thomas J in *Suresh v State of Uttar Pradesh*, where His Lordship said:

> Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract s 34, eg the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why s 34 cannot apply in the case of those two persons indicated in the illustrations.
>
> Thus to attract s 34 of the IPC two postulates are indispensable: (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person; (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.
>
> Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of s 34 of the IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of s 32 of the IPC. So the act mentioned in s 34 of the IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, eg a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for

> the accomplishment of the crime, s 34 of the IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of s 34 of the IPC.
>
> (32) So too here. The fourth and fifth accused were, on the evidence already rehearsed, acting in concert. By means of the cellphone and other conversations, they were very much constructively present and participated in the abetment of the killing of the deceased.

[42] Thus, the evidence tendered by the prosecution cannot be read in isolation by separating the evidence of SP4 pertaining to the conduct of the third appellant at the time of the raid on the said apartment from the conduct of the first and second appellants. It must be emphasised that the prosecution relied on common intention to pin criminal liability on all of the three appellants. In analysing the first ground, it is therefore appropriate to consider the evidence of SP4 and the police party together. In that way, the whole picture can be seen and appreciated. Towards this end, the learned High Court judge, in his written grounds of judgment, aptly said at pp 213–214 of the appeal record at *Jilid* 2:

> ii. Whether the 3 accused persons were in possession of the dangerous drugs
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> It is trite law that the prosecution must prima facie establish 2 ingredients firstly, custody and control and secondly, knowledge of the dangerous drugs for the 3 accused persons to be deemed in possession of the same. The 1st and 2nd accused persons were the tenants of the apartment as established through the testimony of the apartment's owners, SP3 and SP6. The occupancy of the apartment by the 1st accused is also established through the Astro television bill (Exhibit P33) registered to the 1st accused. SP3 has testified that upon letting the apartment to the 2nd accused in March 2008, he had handed over 2 pairs of keys i.e. 1 pair for the wooden door and another pair for the grill door to the 2nd accused. SP3 has established that throughout the tenancy, he had gone over to the apartment and had collected the rental monies from the 2nd accused. SP6 has established that the apartment was rented to the 1st accused for a period of one year from March 2008 to March 2009. The defence counsel has not challenged the fact that the 1st and 2nd accused persons were occupying the apartment as tenants as at the date of arrest on 3.3.2009. The 1st and 2nd accused persons were thus having the control and custody of the apartment in which the dangerous drugs were discovered on 3.3.2009. The 2 plastic bags containing the dangerous drugs i.e. exhibits P7A and P8B were discovered by SP4 on the floor of the apartment's hallway. The plastic bags were easily accessible by the occupiers of the apartment i.e. the 1st, 2nd and 3rd accused persons on 3.3.2009 at the time of the police raid. The Federal Court via His Lordship Augustine Paul FCJ (as he then was) in *Parlan bin Dadeh v PP* [2008] 6 MLJ 19 at page 28 held that:
>
> 'We begin by asking the question who it is who placed the packet in the accused's jeans? The reasonable inference is that it was the accused who did so.'

By analogy, the inference that is reasonably arrived at is that the dangerous drugs were brought into the apartment and placed inside the apartment by the tenants of the apartment i.e. the 1st and 2nd accused persons. The fact that the dangerous drugs were discovered in the apartment which was occupied and under the dominion of the 1st and 2nd accused persons establishes that both accused had dominion over the dangerous drugs. This finding is based on the evidence of the surrounding circumstances as are stated in the above passages. The circumstantial evidence elucidated in the above passages is sufficient on a prima facie basis to prove the ingredient of custody and control of the dangerous drugs to the 1st and 2nd accused persons. The prosecution's failure to elicit DNA evidence as argued by the defence counsel does not weaken the prosecution evidence regarding the issue of custody and control over the drugs.

[43] Continuing at pp 214–216 of the appeal record at *Jilid* 2, the learned High Court judge had this to say:

The next determination is whether there existed knowledge of the dangerous drugs. In *PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1 at 7-9, his Lordship A riff in Zakaria FCJ held that:

> But mere custody and control is not sufficient to establish possession for the purpose of the Act, there has to be established knowledge of such drug by the respondent. In *Chan Peon Leon v PP* [1956] MLJ 237 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and at p 239 he observed:
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.
>
> Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature. We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge.

It is established through the testimony of SP4, SP5 and SP7 that the 1st and 2nd accused persons had attempted to escape police arrest after the police entered the apartment on 3.3.2009. The 1st accused had run towards the apartment's balcony and jumped out until he fell to the ground which is 7 floors down. The 2nd accused had followed suit after being alerted to the presence of the police by the 1st accused

and had climbed down from the balcony to the 3rd floor where he had hidden in an empty apartment. Both accused had risked their lives by attempting to escape from the balcony on the 7th floor. The most plausible reason for taking such a risk was the fear of police arrest. Had it been otherwise, that they did not know about the dangerous drugs, there would have been no plausible reason for jumping out from the 7th floor balcony. Such action reasonably infers knowledge on the 1st and 2nd accused persons of the dangerous drugs. Therefore, I find that the 1st and 2nd accused persons have had the mens rea possession of the dangerous drugs.

[44] Finally, at pp 216–218 of the appeal record at *Jilid* 2, the learned High Court judge said:

The 3rd accused had only entered Malaysia on 1.3.2010 and had stayed in the apartment that was rented to the 1st and 2nd accused persons. At the time of the police raid on 3.3.2009, the 3rd accused was sitting on a sofa in the hall. This fact is established from the testimony of SP4. The dangerous drugs that were in the 2 plastic bags which were left on the floor in the hall were within a close distance to the 3rd accused. The prosecution need not prove that the 3rd accused had committed the wrongful act herself. The prosecution only has to establish a link between the 3rd accused to the criminal act committed by the 1st and 2nd accused persons. A detailed elucidation as to the governing principle to establish common intention is laid down in *PP v Mohd Farid Mohd Sukis & Anor.* [2002] 8 CLJ 814 at page 828-829 where his Lordship Augustine Paul J. (as he then was) held that:

This section (S 34 of the Penal Code) lays down a rule of evidence to infer joint responsibility for a criminal act committed by several persons (See *Too Yin Sheong v PP* [1999] 2 SLR 682). In order for the section to apply it is not necessary for all the participants to perform all the elements of the crime committed. As Mallals Penal Law edited by Andrew Christopher Simon says at p. 51:

The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. For instance, one may only stand guard to prevent any person coming to the relief of the victim or otherwise to facilitate the execution of the common design. Such a person also commits an 'act' as much as his co-participants, actually committing the planned crime.

Thus, the section operates to impute liability to a participant whose act contributed to the crime committed though he could not be proved to have committed the actus reus himself (see *Shaiful Adham bin Adam & Anor v PP* [1999] 2 SLR 57). It is essential that the participants have some knowledge that an act may be committed which is consistent with or would be in furtherance of the common intention. The prosecution must establish that there was a pre-arranged plan to commit a criminal act and the crime forming the subject matter of the charge was done in concert pursuant to that pre-arranged plan (see *Dato' Mokhtarbin Hashim & Anor v PP* [1983] 2 MLJ 232; *Ong Chee Hoe & Anor v PP* [1999] 4 SLR 688). It is difficult to prove common intention by direct evidence. It is usually inferred from the facts of a particular case. As observed by the Privy Council in *Mahbub Shah v King Emperor* [1945] AIR PC 118:

> It is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual, in most cases it had to be inferred from his act or conduct or other relevant circumstances of the case.

The law that I have discussed shows that in order to establish that the accused persons acted with common intention the prosecution must show that there is a link between them with regard to the cannabis that was recovered.

The facts as established through the testimony of SP4 is that at the time of the arrest on 3.3.2009, the 3rd accused had started to cry and had stated that she did not have any knowledge of any dangerous drugs. The pertinent fact is that the 3rd accused had denied having knowledge of the dangerous drugs even before the police had shown the drugs in the 2 plastic bags to her. Her act in crying before any act on the part of the police could reasonably infer her knowledge as to the presence of the drugs in the apartment and her fear of being arrested. These facts are the circumstances to evidence the connection between the 3rd accused to the dangerous drugs. I find that the most plausible explanation is that the 3rd accused was an accomplice of the 1st and 2nd accused persons with regards to having possession of the dangerous drugs.

Based on the above reasons, I find that the prosecution has proven on a prima facie basis that the 1st, 2nd and 3rd accused persons were in possession of the dangerous drugs independent of the statutory presumption under Section 37(d) of the Dangerous Drugs Act 1952.

[45] The learned High Court judge also considered the question as to whether the three appellants were trafficking in the dangerous drugs and this can be seen at pp 218–219 of the appeal record at *Jilid* 2:

> iii. Whether the 3 accused persons were trafficking in dangerous drugs
>
> The 1st and 2nd ingredients i.e. (1) custody and control and (2) knowledge of the 1308.9 grams (1136.6 gram heroin and 172.3 grams monoacetylmorphines) of dangerous drugs have been prima facie proven against the 1st, 2nd and 3rd accused persons. In law, the 1st accused, the 2nd accused and the 3rd accused are proven to have had possession of the dangerous drugs of heroin and monoacetylmorphines on 3.3.2009. The presumption of trafficking under Section 37(da)(iiia) of the Dangerous Drugs Act 1952 is raised on a minimum nett weight of 15 grams for possession of the drug heroin and monoacetylmorphine. In this case, the nett weight of the dangerous drugs which is 1308.9 grams is far in excess of the statutory minimum to invoke the presumption of trafficking against the 3 accused persons.
>
> In conclusion, after according the maximum evaluation to the prosecution evidence, I find that the prosecution has prima facie established that the 1st, 2nd and 3rd accused persons were trafficking in dangerous drugs based on the statutory presumption under Section 37(da)(iiia) of the Dangerous Drugs Act 1952. The 3

accused persons have been called to enter their defence. All 3 accused persons have chosen to give evidence from the witness stand as stated as follows.

[46] The excerpts from the written grounds of judgment of the learned High Court judge as reproduced above showed that the prosecution had established possession against all of the three appellants. The salient facts adduced by the prosecution established that:

(a) the first and second appellants were the tenants and occupiers of the said apartment based on the evidence of SP3 and SP6 as well as the Astro receipt (exh 'P33');

(b) the conduct of the first appellant in running towards the balcony of the said apartment and jumping down even before the discovery of the drugs by SP4 showed that he had prior knowledge of the drugs in the two plastic bags;

(c) the conduct of the second appellant, who was clad in only a towel, in running towards the balcony of the said apartment and climbing down from the balcony and hiding in the ceiling of the third floor unit even before the discovery of the drugs by SP4 showed that he had prior knowledge of the drugs in the two plastic bags;

(d) as a result of jumping down from the balcony, the first appellant broke both of his hands and shoulder and sustained injury to his waist and this showed that he was risking his life by jumping down for fear of being arrested by the police in regard to the drugs;

(e) according to SP4, the third appellant appeared frightened and when SP4 approached the third appellant she cried and said that she did not know about the drugs seized by SP4; and

(f) the third appellant was in close proximity to the two plastic bags containing the drugs and her act of crying gave rise to an inference that she had knowledge about the drugs.

[47] Knowledge is strictly a question of fact. And knowledge may be inferred from the circumstances surrounding each particular case.

[48] Before the learned High Court judge, the defence submitted that, 'The prosecution's case rests entirely on pure circumstantial evidence' (see the written grounds of judgment of the learned High Court judge at p 211 of the appeal record at *Jilid* 2).

[49] Now, in our judgment, the circumstantial evidence, such as that relied on by the prosecution in the present appeal, provides a foundation for an inference to be drawn as to the third appellant's conduct of crying. The

spectrum of circumstantial evidence is a broad one which may extend to seemingly benign activity like crying which would however indicate a common intention to commit the offence of trafficking in dangerous drugs with the first and second appellants as per the charge. It must be borne in mind that the two plastic bags containing the drugs were not closed, in that, their ends were not tied together and so their contents could be readily seen. And according to SP4, both the plastic bags were found in the living room/hall of the said apartment and not in the middle room (second room) as alleged by the third appellant. Just like the learned High Court judge, we also believed the evidence of SP4.

[50] It can be inferred from the factual matrix of the case that all of the three appellants were aware of the drugs that were found in the two plastic bags located on the floor of the living room of the said apartment. In our judgment, the prosecution succeeded in proving possession of the drugs independent of the presumption under s 37(d) of the DDA and since the weight of the drugs exceeded 15g, the presumption of trafficking under s 37(da)(iiia) of the DDA was triggered and invoked by the learned High Court judge.

[51] The amount of the drugs discovered was substantial and thus they were not meant for personal consumption as exemplified in the case of *Ong Ah Chuan v Public Prosecutor*, *Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, (PC).

[52] Possession is an important ingredient in the charge of trafficking. If there is direct evidence of trafficking, the task of the prosecution is made easier otherwise the prosecution will have to prove the ingredient of 'possession'. It is the duty of the trial court to make an affirmative finding of 'possession' before the presumption of trafficking under s 37(da)(iiia) of the DDA can be invoked (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, (FC)). Here, as alluded to earlier, the learned High Court judge had made an affirmative finding of possession against all the three appellants.

[53] On conduct, we need to refer to two authorities germane to the occasion at hand. The first is the case of *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1, (SC). The second is the case of *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733, (FC). In *Abdullah Zawawi bin Yusoff*, Edgar Joseph Jr SCJ, writing for the Supreme Court, had this to say at p 6 of the report:

> We now come to what does seem to us evidence of a potent kind against the appellant; namely, his conduct in taking to his heels upon Inspector Mat Yusoff announcing the discovery of the drugs in the box. This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt.

On the other hand, it was conduct equally consistent with the appellant having been in a state of pure panic, bearing in mind that it was only after Inspector Mat Yusoff announced the discovery of the drugs that the appellant took to his heels. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away, but we agree with the Judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *D.P.P. v Brooks* [1974] 2 AER 840, cited to us by the learned Deputy Public Prosecutor, where the accused, who occupied the driver's seat of a stationary van which contained more than 1000 lbs. of ganja, together with sevral others in the van, scrambled out and ran off, when police officers hurried towards the van, is, therefore, readily distinguishable.

[54] In *Teng Howe Sing v Public Prosecutor* , Zulkefli Makinudin FCJ (now Chief Judge, Malaya), writing for the Federal Court, aptly said at pp 58–59(MLJ); 745–746(CLJ) of the report:

(22) We also would take the view that the appellant's conduct in throwing the package and running away upon hearing shouts by the police points to the evidence of knowledge on the part of the appellant as to the contents of the package that he was carrying on that day. In the case of *Abdullah Zawawi Yusoff v PP* [1993] 3 MLJ 1; [1993] 4 CLJ 1, this court came to the conclusion that the accused's conduct in taking to his heels upon the police announcing the discovery of the drugs in the box was equivocal because the conduct of the accused was equally consistent with the accused having been in a state of pure panic, bearing in mind that it was only after the police announced the discovery of the drug that the accused took to his heels. This court therein said this was distinguishable from the facts of the case in *DPP v Brooks* [1974] 2 All ER 840, where the accused, who occupied the driver's seat of a stationary van which contained more than one thousand pounds of ganja, together with several others in the van, scrambled out and ran off, when the police officers hurried towards the van even before the discovery of the drugs. However, this court in the case of *Parilan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 had discussed the applicability of evidence of conduct to infer knowledge as discussed in Abdullah Zawawi's case and Brook's case and held at p 748 as follows:

The difference in both the cases is that in *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of section 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff v PP* (supra) is therefore authority only to this extent. On the other hand in *DPP vrooks* [1974] 2 All ER 840 there was evidence to show that the drugs were in the physical custody and control of the acussed and his conduct of running away thus comes, in the Malaysian context, within the meaning of section 8. It is therefore admissible and cannot be explained away by the Court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by section 9.

[55] We will now refer to the famous case of *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, a decision of the Privy Council. In that case, the respondent was seated in the driver seat of a van. When the police officers hurried towards the van, the respondent with others inside the van scrambled out and ran off. The respondent was arrested. Inside the van, the police found 19 sacks containing a total of more than 1,000 lbs of ganja. When questioned by the police officers, the respondent said that he had been employed by R and had been told to drive the van, loaded as it was, to Braco. Lord Diplock delivering the judgment of the Privy Council had this to say at p 843 of the report:

> On the evidence, including his own statement to the police, the 19 sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. On all the evidence and in particular the fact that he and the other occupant of the van attempted to run away as soon as they saw the uniformed police approaching, the magistrate was, in their Lordships' view, fully entitled to draw the inference that the respondent knew what he was carrying in the van.

[56] Here, we have the evidence of the damning conduct of the first and second appellants in running away from the said apartment as alluded to earlier. We also have the conduct of the third appellant who was seated on the sofa in the living room at that time and according to SP4, when asked about the reaction of the third appellant, replied that the third appellant appeared frightened and when SP4 approached her, she cried and said that she did not know about the drugs that was seized by SP4. Without a doubt, all of the three appellants knew about the drugs in the two plastic bags. The drugs were not hidden and they were visible on the floor of the living room. The ends of both the plastic bags were not tied together and so their contents — drugs, could readily be seen. The close proximity of the drugs to the third appellant proved the element of possession against the third appellant.

[57] In regard to the element of possession, it is germane at this juncture to refer to the case of *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197, a decision of Raja Azlan Shah J (as His Majesty then was). There, His Royal Highness aptly said:

> In his grounds of decision the learned magistrate came to the conclusion that there was no physical possession on the facts disclosed. He based his conclusion on the fact that exh P1 was recovered from the dressing table some three feet away from the respondent and there was lack of evidence as to how the said exhibit came to be on the table or when or by whom they were left there. The facts speak for themselves, and it is for the learned magistrate to draw the necessary inference of physical possession. With regard to the aspect as to how the exhibit came to be on the dressing table, to my mind the learned magistrate has misdirected himself. What the

prosecution has to accomplish in this case is whether it has proved its case beyond reasonable doubt but not beyond the shadow of a doubt. As was stated by Denning J (as he then was) in *Miller v Ministry of Pensions* [1947] All ER 372:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.

With regard to the mental element, the learned magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstance when the respondent tried to close the door on PW1. But he failed to consider the other circumstance which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question.

[58] The principles enunciated in *Public Prosecutor v Foo Jua Eng* have been applied in *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212, (FC); and in *Khairuddin bin Hassan v Public Prosecutor* [2010] 6 MLJ 145, (FC).

[59] We acknowledge that the drugs were first found in the living room/hall of the said apartment by SP4 and SP4 was then asked by the prosecution as to the reaction of the third appellant and SP4 said that the third appellant replied that she was afraid and she was crying and she also said that she did not know anything about the drugs. But the drugs were not shown to the third appellant by SP4, and yet, the third appellant cried. At this time, both the first and second appellants were no longer in the said apartment — their escape from the balcony of the said apartment was witnessed by the third appellant. The third appellant could not do anything except to cry. She also appeared frightened. That was the conduct that she exhibited to SP4 and that was indeed a damning conduct. Knowledge of the drugs in the said apartment by the third appellant can be inferred from the surrounding circumstances. We reiterate that knowledge is purely a question of fact that can be deduced from the circumstances surrounding the present case.

THE SECOND GROUND

[60] It was argued that there was a failure on the part of the learned High Court judge to appreciate the defence case. Such failure, it was argued, constituted a misdirection.

[61] In considering this ground, the submissions of the parties will inevitably be rehearsed once again. It is a necessary exercise that will show that, in fact, the learned High Court judge had carefully appreciated the defence case. We will take the arguments of the parties and promote it in the best way possible.

[62] Learned counsel for the third appellant submitted that she was a visitor to the said apartment, having arrived in Malaysia on 1 March 2009. She came for a holiday and for some shopping. She stayed with the second appellant in the back room to the said apartment, having met the second appellant in an internet chat room.

[63] It was submitted that the third appellant was in the kitchen cooking at the time of the police raid. She was then brought to the hall where she then sat on the sofa. It was pointed out that she explained as to why she cried, namely, she was handcuffed and that she saw the second appellant being beaten up.

[64] It was further submitted that it was the third appellant's version that the police found the drugs in the centre room of the said apartment. She also testified that there were four persons who stayed in the said apartment and she identified the other two as Sunday (DW4) and the person as shown in the photograph IDD47. She also gave a cautioned statement (exh 'D45') and it was said to be exculpatory in nature.

[65] It was submitted that the third appellant's defence was not appreciated by the learned High Court judge. It was emphasised that the defence of the third appellant was put to the relevant prosecution witnesses. It was put that she was in the kitchen and that the plastic bags were found in the centre room of the said apartment and that the third appellant had no knowledge of the plastic bags. Yet, it was submitted that her defence was not appreciated by the learned High Court judge.

[66] It was submitted that after having put her case, the learned High Court judge criticised the third appellant's defence as an afterthought and a mere concoction. It was further submitted that the third appellant's cautioned statement was dismissed in one sentence. It was pointed out that the learned High Court judge said that he was unable to find any reasonable doubt because the third appellant did not stay in a proper hotel and that she cried before the drugs were shown to her. Learned counsel criticised the approach adopted by the learned High Court judge and argued that such an approach was plainly wrong.

[67] With regard to the defence of the first and second appellants, the learned counsel conceded that:

(a) both the first and second appellants were tenants of the said apartment;

(b) both the first and second appellants escaped when the said apartment was raided by SP4 and his police party; and

(c) both the first and second appellants explained as to why they fled.

[68] Notwithstanding the concessions, it was submitted that: A

(a) both the first and second appellants had no knowledge of the presence of the drugs found in both the plastic bags;

(b) both the plastic bags were not found in the living room/hall as alleged but were found in the second room; B

(c) the occupier of the second room was one Ifeanyi who paid rental of RM200 per month; and

(d) by way of corroboration, both the first and second appellants called Sunday (DW4) as their defence witness and DW4 while giving evidence produced a photograph of Ifeanyi. DW4 also confirmed that he shared the front room with the first appellant while Ifeanyi occupied the second room. C

[69] In regard to the evidence of Sunday (DW4), it was submitted that his evidence was unchallenged. DW4 testified that he shared the master bedroom with the first appellant and that Ifeanyi occupied the second or middle room. DW4 testified that the third appellant was a visitor and that on 3 March 2009 when he left the said apartment at about 2pm, Ifeanyi was still in the said apartment. D E

[70] It was pointed out that DW4's evidence that Ifeanyi occupied the second room and Ifeanyi was in the said apartment on 3 March 2009 at about 2pm when DW4 left the said apartment was not challenged. Only the photograph of Ifeanyi — IDD4, was challenged that it was not Ifeanyi. That being the case it was submitted that the learned High Court judge should have acted on the unchallenged evidence of DW4 and that His Lordship completely ignored the evidence of DW4 and such an omission was said to amount to a serious miscarriage of justice. F G

[71] By way of a rebuttal learned deputy public prosecutor replied along these lines:

(a) that the learned High Court judge made reference to the conduct of the third appellant in crying even though the drugs were not shown to the third appellant by SP4; H

(b) such conduct showed that the third appellant had prior knowledge of the drugs in the two plastic bags;

(c) the physical proximity of the drugs to the third appellant and the conduct of the third appellant in crying supported the finding that the third appellant was in possession of the drugs; I

(d) the cautioned statement of the third appellant marked as exh 'D45' was

recorded on 6 March 2009 at 4.30pm before Inspector Prakphat a/l Tim and in exh 'D45', the third appellant narrated her story as follows:

(i) that she just arrived in Kuala Lumpur on 1 March 2009 and on the day of her arrest she was cooking in the kitchen;

(ii) then suddenly a few male and female persons entered the said apartment and they introduced themselves as 'police' and they directed the third appellant to sit at the living room and they then examined the said apartment;

(iii) the police took a plastic bag and placed it on the table of the living room and they told the third appellant that they were drugs and the third appellant said that she did not know anything about the drugs;

(iv) she came to Kuala Lumpur alone and the purpose was purely as a tourist;

(v) she went to the said apartment with Alex;

(vi) she was in the said apartment with Alex and another male Negro;

(vii) that the drugs that were found in the said apartment did not belong to her; and

(viii)she did not know who owned the drugs found in the said apartment.

(e) the learned High Court judge considered the cautioned statement of the third appellant in one sentence as reflected at p 226 of the appeal record at *Jilid* 2 as follows:

> The third accused person's caution statement does not create any reasonable doubt against the prosecution evidence in light of these facts.

[72] Now, a perusal of the third appellant's cautioned statement in exh 'D45' indicates that it did not state that the drugs were found in the middle room nor did it state that there were two other persons staying in the said apartment by the names of Ifeanyi and Sunday Michael (DW4).

[73] The third appellant's cautioned statement in exh 'D45' did not support her oral testimony except that she was consistent in regard to the following matters:

(a) that she was in the kitchen of the said apartment when the raid took place; and

(b) that she did not have any knowledge about the drugs.

[74] The third appellant's cautioned statement in exh 'D45' contradicted the defence version that the police showed her the plastic bags containing the drugs

and the police asked her what they were. In sharp contrast, in her cautioned statement, the third appellant said that the police told her that the plastic bags contained drugs.

[75] In her oral testimony, the third appellant testified as follows. She said that she first cried because she was terrified as she was told to be quiet and she was handcuffed. Then she cried the second time after she was shown the plastic bags and was asked what they were and who they belonged to. She said that she cried because she did not know what was happening and she was told to be quiet. She subsequently cried again when the second appellant was brought into the said apartment and was assaulted.

[76] Again, in her oral testimony, the third appellant testified that the first and second appellants were having a conversation with each other when she heard a knock on the front wooden door just before the raid. In sharp contrast, the first appellant testified that he met the second appellant watching television in the living room when he returned to the said apartment and he then went straight to his room. About half an hour later, the first appellant heard a knock on the front wooden door and he went to open it. Again, in sharp contrast, the second appellant testified that he greeted the first appellant in the living room before the first appellant went to his room and the second appellant then went to have his bath. All of these contradictions impinged on the credibility and veracity of the defence version.

[77] From pp 223–226 of the appeal record at *Jilid* 2, the learned High Court judge rightly evaluated the defence of the three appellants and His Lordship concluded as follows:

(a) the explanation advanced by the first appellant for running to the balcony and jumping down was because of his fear of being robbed by robbers was highly improbable bearing in mind that the first appellant had heard the knocking on the front wooden door and the introduction of 'Open the door, we are DBKL' before opening the front wooden door;

(b) the first appellant was not suspicious of anyone especially when it was late at night — at 11pm, and the front grille was not locked even at that late hour although the front wooden door was locked;

(c) the second appellant who was scantily clad in a towel, ran to the balcony, climbed down to the third floor, hid himself in the ceiling and eventually surrendered to SP5;

(d) if the second appellant was running away from burglars, it would be more prudent for him to proceed to the ground floor and alert the security or even the police;

(e) in running away, the second appellant did not alert the third appellant to escape from the robbers;

(f) the keys to the said apartment were handed to the second appellant and the latter also paid the monthly rental whereas the said apartment was rented out to the first appellant and the Astro receipt was in the name of the first appellant, consequently, both the first and the second appellants had custody and control of the said apartment and by necessary inference they had knowledge of the drugs in the said apartment which accounted for their actions to flee from the police;

(g) the third appellant's version that the purpose of her visit to Malaysia was to buy imitation handbags was an afterthought and a concoction bearing in mind that her cautioned statement in exh 'D45' stated that she came as a tourist; and

(h) there was no suggestion to the prosecution witnesses that the third appellant's visit to Malaysia was to buy imitation handbags and this was also not stated in her cautioned statement in exh 'D45'.

[78] The evidence against all the three appellants were indeed overwhelming. Yet, learned counsel implored that they be acquitted and discharged for trafficking in the dangerous drugs as per the charge.

[79] On our part, we gave our decision in this way:

> This is our unanimous decision. We have perused through the evidence with a fine toothcomb and we have also considered the written grounds of judgment of the learned High Court judge as well as the submissions of the parties and we find that there is evidence of possession of the dangerous drugs by all the three appellants pursuant to a common intention. The charge in this case was that pursuant to a common intention the three appellants were trafficking in the dangerous drugs and the learned High Court judge found them guilty of the offence of trafficking having applied the presumption under s 37(da)(iiia) of the DDA. However, we find that when the learned High Court judge came to consider the defence case, His Lordship misdirected himself when he failed to consider at all the question of whether the first, second and third appellants had rebutted the presumption of trafficking under s 37(da)(iiia) of the DDA on the balance of probabilities (*Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, (PC)). In the circumstances, we are of the considered view that it is unsafe to convict all the three appellants for the offence of trafficking in the dangerous drugs as per the charge. But we are satisfied and we hold that on the available evidence, there is clear evidence of possession of the dangerous drugs in question pursuant to a common intention of them all. Consequently, we quash the convictions and sentences under s 39B(1)(a) of the DDA and punishable under s 39B(2) of the DDA read with s 34 of the Penal Code and we substitute it with a conviction of each of the appellants under s 12(2) of the DDA and punishable under s 39A(2) of the DDA read with s 34 of the Penal Code.

[80] In law, all the three appellants had to rebut the operative presumption of trafficking under s 37(da)(iiia) of the DDA on the balance of probabilities and this was not considered by the learned High Court judge. The level of rebuttal places a higher evidential burden on all the three appellants. Towards this end, the Privy Council case of *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, (PC), is the correct authority for the proposition that the rebuttal of the presumption of trafficking should be on the balance of probabilities. In that case, Lord Diplock, delivering the advice of the Privy Council, aptly said at p 92 of the report:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

[81] Having convicted all the three appellants under s 12(2) of the DDA and punishable under s 39A(2) of the DDA read with s 34 of the Penal Code, the only thing left for us to do was to consider the appropriate sentences that should be meted out. The law books are replete with authorities on sentencing.

[82] Abdul Malik bin Ishak, JCA in *Muhammad Isa bin Aris & Ors* [2011] 5 MLJ 342 at p 350; [2011] 3 CLJ 510 at p 520; and [2011] 3 AMR 281 at p 289 had this to say in regard to sentencing:

> (18) It is not easy to sentence an accused person appropriately benefitting the nature and circumstances of the offence. But an accused person who chooses to commit a crime must be held accountable and be responsible for the resulting evil and he deserves to be punished. The sentence meted out should adequately reflect the revulsion of the citizens for the particular crime committed. The purpose of sentencing is seen not only as a punishment to the accused person, it is also seen as a public denunciation of the criminal act in question.
>
> (19) The sentence meted out must be proportionate to the offence. It is often said that the business of the court is to do justice and this can achieved if the sentence is proportionate between one offender to that of another.

[83] Lawton LJ's analysis of the classical principles of sentencing and other general aspects of punishment in the English Court of Appeal in *R v James Henry Sargeant* [1974] 60 Cr App R 74, (CA) at pp 77–78 was referred to by Abdoolcader J (later SCJ) in *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186 at p 187 and the same principles should apply to our Malaysian Courts. The classical considerations relevant to all sentences are said to be in this order: retribution, deterrence, prevention and rehabilitation. But Abdoolcader J (later SCJ) in *Public Prosecutor v Teh Ah Cheng*, which concerned the unlawful possession of a firearm and ammunition rightly held that deterrence and prevention assumed frontal positions in dealing with such offences. Likewise here, we are of the considered view that the large amount of the drugs involved must necessarily be curtailed by adopting 'deterrence and prevention' as barometers in meting out the appropriate sentences to all the three appellants.

[84] The main purpose of imposing a deterrent punishment is to protect the public interest (*Public Prosecutor v Loo Chang Hock* [1988] 1 MLJ 316 at p 318, per Zakaria Yatim J (later SCJ) following *R v Kenneth John Ball* [1951] 35 Cr App R 164 at p 165). It is often said that the courts are the guardians of public interest (*Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, (FC) at p 84, following the *AG v British Broadcasting Corporation* [1980] 3 All ER 161 at p 172 (England)).

[85] Public interest is also the first and foremost consideration in sentencing (per Smith J in *Public Prosecutor v Ismail bin Loyok* [1958] MLJ 223 at p 224; per Abdoolcader J in *Public Prosecutor v Teh Ah Cheng* ; and per Hashim Yeop A Sani J (later Chief Justice — equivalent to Chief Judge) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257).

[86] We acknowledge that a plea in mitigation should not be set aside lightly but must be examined and considered equally with the facts presented by the prosecution (per Hashim Yeop A Sani J (later Chief Justice — equivalent to Chief Judge) in *Raja Izzuddin Shah v Public Prosecutor* [1979] 1 MLJ 270). This is the best way to adopt in order to strike a balance in the scales of justice.

[87] We took into account that all the three appellants were first-time offenders and that they are foreigners. We also took into account their respective roles as reflected in the factual matrix outlined in this judgment. We were urged to make an order that the sentences imposed should run from the date of arrest. The clarion call by the learned deputy public prosecutor in the person of Madam Nurulhuda Nuraini bt Mohd Nor to impose deterrent sentences for all the three appellants cannot be swept under the carpet, so to speak. It was emphasised that the first and second appellants came to Malaysia as students and they ended up committing a serious offence.

[88] For all these reasons, we sentenced the first appellant to 20 years imprisonment with effect from the date of his arrest (3 March 2009) and with whipping of 18 strokes of the rattan.

[89] In regard to the second appellant, we sentenced him to 20 years imprisonment with effect from the date of his arrest (3 March 2009) and with whipping of 18 strokes of the rattan.

[90] In regard to the third appellant, we sentenced her to 20 years imprisonment with effect from the date of her arrest (3 March 2009). By virtue of s 289(a) of the CPC, she is spared the punishment of whipping.

Appeal allowed and convictions and sentences quashed.

Reported by Kohila Nesan